Supreme Court, U. S.
FILED
NOV 28 1977
MICHAEL RODAK, JR., CLERK

No. 77-621

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

RICHARD F. NESTLER, ET AL., *Petitioners,*

v.

EXXON CORPORATION, *Respondent.*

OPPOSITION OF EXXON CORPORATION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners seek a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Petitioners assert that the Court of Appeals' decision affirming summary judgment entered by the United States District Court for the District of Columbia is inconsistent with this Court's decision in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). Petitioners also assert that the denial by the District Court of petitioners' belated demand for a jury trial violated the Seventh Amendment to the Constitution of the United States.[1]

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[1] The Court of Appeals did not reach the question relating to petitioners' jury demand because it affirmed the District Court's order granting summary judgment. (See Petitioners' appendix, p. 1a).

COUNTERSTATEMENT OF THE CASE

Petitioners originally based their action primarily on alleged breach by Respondent of three agreements entered into by the parties on August 1, 1968. The so-called antitrust claim which was thrown in for good measure is found only in one paragraph of the complaint, and consists of vague and general allegations charging conspiracy to monopolize, monopolization and attempted monopolization by Respondent of unspecified "trade and commerce" among the states of the United States.

Petitioners failed to demand a jury trial on any issue involved in the complaint within the time limit prescribed by Rule 38(b) of the Federal Rules of Civil Procedure. Respondent likewise made no jury demand.

More than four months after Respondent's answer was served, Petitioners filed and served a jury demand. Thereafter, the District Court struck Petitioners' jury demand on the ground that it was "untimely having been made four months after the last pleading was filed, and there being inadequate reason shown to cause the Court to exercise its discretion under Rule 39(b) of the Federal Rules of Civil Procedure."

On April 12, 1974, Petitioners petitioned the Court of Appeals for a writ of mandamus directing the District Court to vacate its order striking the jury demand. That petition was denied on April 25, 1974.

Thereafter, on July 25, 1974, Petitioners' petitioned this Court for a writ of certiorari directed to the Court of Appeals. (No. 74-10). That petition was denied on October 15, 1974.

Respondent's initial motion for summary judgment was filed on June 18, 1974, but was denied on November 11, 1974, without prejudice pending completion of discovery. When discovery was completed, Respondent renewed its motion for summary judgment. That motion was granted on May 12, 1976.

The essential charges alleged in Petitioners' complaint are set out in the opinion of the District Court which is reproduced at page 1b-14b of Petitioners' supplemental appendix filed herein. The antitrust claim, which is specifically referred to at pages 9b-14b thereof, needs to be considered in the light of the contract claims which, as stated, originally constituted the heart of Petitioners' complaint.

As noted by the opinion of the District Court, it was difficult to sort out with any assurance the rambling and vague assertions which constituted Petitioners' antitrust claims. The District Court concluded that "the elements of the antitrust violation alleged by plaintiffs are that Exxon first arranged to gain sole access to nested-bag machines and then entered into agreements with Nestler, all the while planning not to use the license rights it acquired, thereby eliminating Nestler as the only competition in the nested bag field." (Petitioners' supplemental appendix, p. 10b).

As the District Court went on to say, the facts of record did not support those contentions. Those record facts went far beyond the rambling, self-serving affidavits filed by Petitioners.[2] The District Court had before it a three-day deposition given by the principal

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[2] It is noteworthy that Petitioners have not included copies of these affidavits in their petition.

petitioner, Richard F. Nestler, a deposition of a representative of the bag machinery manufacturer, and exhibits identified in connection therewith, as well as the sales agency and the patent license agreements entered into by the parties. None of these documents is discussed in the petition filed herein. None of them was in dispute; and it is clear from the District Court's opinion that it relied upon those documents in entering summary judgment.

ARGUMENT

1. Petitioners' Jury Trial Contention

The claim of Petitioners that their Seventh Amendment rights were violated by the District Court's refusal to grant the belated jury demand was previously brought before this Court when Petitioners filed their petition for a writ of certiorari in No. 74-10. That petition was denied. There have been no changes in circumstances which would now justify a granting of the present petition on that issue. Accordingly, for that reason alone, the Court should deny that portion of the petition for a writ of certiorari seeking review of the District Court's denial of Petitioners' jury demand.

That portion of the petition should, in any event, be denied. Rule 38(b) of the Federal Rules of Civil Procedure provides in part as follows:

> "Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue."

Rule 38(d) provides in part as follows:

> "The failure of a party to serve a demand as required by this rule . . . constitutes a waiver by him of trial by jury."

As noted above, neither the Petitioners nor Respondent made a jury demand within 10 days after the service of the answer. Petitioners waited for more than four months following serving and filing of interrogatories, and several weeks after they were answered, before filing their jury demand. This clearly indicates that the belated jury demand was filed because, for some unknown reason, Petitioners changed their minds.

Petitioners' contentions are without merit as shown by decisions of this Court as well as several Circuit Courts. *United States* v. *Moore,* 340 U.S. 616, 621 (1951); *Bush* v. *Allstate Insurance Company,* 425 F.2d 393 (5th Cir. 1970); *Murphy* v. *Shelby,* 353 F.2d 418 (8th Cir. 1965); *General Tire & Rubber Company* v. *Watkins,* 331 F.2d 192 (4th Cir. 1964), *cert. denied,* 377 U.S. 952 (1964); *Tomlin* v. *Pope & Talbot, Inc.,* 282 F.2d 447 (9th Cir. 1960); *Moore* v. *United States,* 196 F.2d 906, 908 (5th Cir. 1952).

In *Tomlin* v. *Pope & Talbot, Inc., supra,* the appellant relied on the provisions of Rule 39(b) of the Federal Rules of Civil Procedure, just as Petitioners have done. However, the Ninth Circuit noted that this rule leaves it to the discretion of the court to decide whether or not to order a trial by jury where, as here, timely demand had not been made. The court said:

> "The view has been stated that as a matter of judicial administration discretion ought rarely to

be exercised to grant a trial by jury in default of a timely request for it. . . ."

"The denial of a motion made under this rule [39(b)] is to be sustained unless an abuse of judicial discretion is shown. See Johnson v. Gardner, 9 Cir., 179 F.2d 114, 118. For this reason appellate courts normally refuse to interfere. 5 Moore's Federal Practice, 2d ed., § 39.09, page 715." (282 F.2d at 449).

There is no basis for concluding that the District Court abused its discretion in striking Petitioners' belated demand. No valid reasons for taking such action were presented to the District Court, nor has any been presented to this Court.

In *Bush* v. *Allstate Insurance Company, supra,* the Fifth Circuit stated:

"It is not an abuse of discretion by a District Judge to deny a Rule 39(b) motion . . . when the failure to make a timely demand for a jury trial results from mere inadvertence on the part of the moving party." (425 F.2d at 396)

Petitioners' conduct here does not even rise (or fall) to the level of inadvertence. Rather, we have at best an admittedly deliberate decision not to demand a jury trial followed by a change of mind several months later.

Petitioners have cited no cases in support of their positions that the District Court abused its discretion in not granting its belated demand for a jury trial. The ruling in *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464 (1962), had nothing to do with the question of whether a court abused its discretion in refusing to invoke the provisions of Rule 39(b) of

the Federal Rules of Civil Procedure. Likewise, neither of the other two cases cited by Petitioners in this portion of their argument relate to the question which confronted the District Court in disposing of Petitioners' belated jury demand.

2. Petitioners' Antitrust Argument

The sole basis for Petitioners' argument on this point is that the decision of the Court of Appeals in the instant case is in conflict with the decision of this Court in *Poller* v. *Columbia Broadcasting System, Inc., supra.*

This Court has pointed out what would appear to be self-evident: That "the question whether summary judgment is appropriate in any case is one to be decided upon the particular facts of that case." *First National Bank of Arizona* v. *Cities Service Co.,* 391 U.S. 253, 259 (1968).

In the instant case, Petitioners were given every opportunity to develop through pretrial procedures some substantial basis for the vague and general antitrust claim contained in their complaint. They were unable to do so. As pointed out by the District Court, "the first time that plaintiffs' antitrust claim was set forth in any kind of detailed fashion was in their opposition to the . . . motion for summary judgment." (Petitioners' supplemental appendix, p. 9b). However, as also pointed out by the District Court, the undisputed agreements between the parties and exhibits of record refuted Petitioners' antitrust claim. Thus, the District Court made the following unchallenged findings:

"As noted above, the critical elements of plaintiffs' claim are: (1) defendant blocked access to

nested bag machinery, and (2) defendant purposefully declined to use its exclusive rights under the license in order to "squeeze out" Nestler, its only potential competitor in the nested bag field. As to the first element, defendant has shown, through exhibits to its motion for summary judgment, that, in 1973, Nestler requested a price quotation from the company which makes the nested bag machinery and received that quotation and an offer to sell. Nestler apparently never took up the offer. Plaintiffs have not countered or explained this evidence. As to the second element, the licensing agreement specifically provides that if Exxon did not produce nested bags, *Nestler would have the right to do so.* Thus, the license was exclusive only so long as Exxon produced nested bags; once Exxon decided not to produce the bags, the monopoly created by the patent ceased to exist, at least to the extent that Nestler could then 'compete.'

"For all of the above reasons, it is clear to the Court that defendant is entitled to summary judgment." (Emphasis in original). (*Id.* at p. 13b).

The views of the Court of Appeals were summed up in the following portion of that court's opinion:

> "It is ironic and revealing that the only specific item that might have provided a wedge for a trial—the October 21, 1971 letter from Mr. McClintock to Nestler-May—was not even included in the appendix filed by plaintiff in this court. Plaintiff has not cited the deposition of Mr. McClintock as pursuing the subject of the letter. And plaintiff did not actually take the deposition that had been noticed from Dr. John McCullough of Exxon, whom Sheldahl identified as the person whose consent was necessary before Sheldahl could supply Nestler-May with the machines.

> "The fact that Exxon entered into an exclusive agreement with Sheldahl is not of itself evidence of an attempt to exclude Nestler-May from the machines. The fact is that from 1968 to 1971 machines were supplied to Nestler-May from Sheldahl, and indeed were part of the Nestler expenses that Exxon subsidized. The October 1971 Sheldahl letter did not deny plaintiff a quote, it merely stated that the matter would have to be reviewed by Exxon. It was sent during a relatively short period when there was some uncertainty whether Exxon would continue with the nested-bags venture. There is no indication at that time whether Nestler would have been denied access to Sheldahl by Exxon, if the Nestler-Exxon venture disbanded. Nestler was at that time insisting on continuance of the venture, and later in 1971 Exxon did resume the nested-bag venture under its agreements with Nestler. In 1973 when Exxon no longer had the exclusive license, and Nestler-May was free to manufacture on its own account, it was offered machines by Sheldahl, as duly pointed out by the District Court.
>
> "As the case was presented to the District Court by counsel and the plaintiff, the District Court properly granted summary judgment." (Petitioners' Appendix, pp. 3a-3b).

It can be seen from the foregoing that both the District Court and the Court of Appeals ruled that summary judgment was supported by undisputed documentary evidence. Unlike the situation in the *Poller* case, motive and intent played no role whatsoever here; and the proof did not lie in the hands of alleged conspirators and hostile witnesses.

CONCLUSION

In view of the foregoing, it is respectfully urged that the petition for a writ of certiorari be denied.

Respectfully submitted,

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